Supreme Court, U.S.
FILED

No. 04-1430 APR 19 2005

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In The

Supreme Court of the United States

ALBERT JACKSON,

Petitioner,

v.

DELAWARE RIVER AND BAY AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the affirmance of a District Court's grant of Summary Judgment to a shipowner in a failure to pay maintenance and cure/Jones Act case should be upheld where the record before the District Court was replete with disputes of material facts; the decision was based in large part on facts not in the record and the decision misapplied or ignored settled law of this Court and the Court of Appeals for the Third Circuit.

2. Whether this Court's Opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), should be read to preclude an award of punitive damages against a shipowner who was recalcitrant and unreasonable when refusing to pay maintenance and cure concurrently with the need.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	2
Reasons for Granting the Petition	13
Conclusion	25

APPENDIX

Appendix A – Opinion of the District Court	App. 1
Appendix B – Opinion of the Third Circuit Court of Appeals	App. 11
Appendix C – Opinion Denying Petition for Rehearing	App. 13
Appendix D – Letter from Supreme Court Clerk	App. 15
Appendix E – Excerpts from Deposition Testimony of Joseph C. Grassi, Esquire, Jackson's Discrimination Counsel	App. 17

TABLE OF AUTHORITIES

Page

CASE CITATIONS

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 14

Bailey v. Central Vermont Railway, Inc., 319 U.S. 350 (1943)..... 14

Barnes v. Andover Co., 900 F.2d 630 (3d Cir. 1990)..... 14

Borne v. A & P Boat Rentals, 780 F.2d 1254 (5th Cir. 1986)..... 18, 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)..... 13

Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957)..... 14

Fitzgerald v. U.S. Lines Co., 374 U.S. 16 (1963)..... 2

Glyn v. Roy Al Boat Management Corp., 7 F.3d 1495 (9th Cir. 1995)..... 23

Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995)..... 23, 24

Harden v. Gordon, 11 Fed. Cas. 480, No. 6047..... 14, 22

Jurgensen v. Albin Marine, Inc., 214 F. Supp. 2d 504 (D. Md. 2002)..... 24

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)..... 14

Miles v. Apex Marine Corp., 498 U.S. 19 (1990)... 22, 23, 24

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)..... 23

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500 (1957)..... 14

Schumacher v. Cooper, 850 F. Supp. 438 (D.S.C. 1994)..... 24

TABLE OF AUTHORITIES – Continued

Page

Schulz v. Penna. R.R. Co., 350 U.S. 523 (1956) 14

Stuart v. Alcoa, S.S. Co., 143 F.2d 178 (2d Cir. 1944) 18

The S.S. Standard, 103 F.2d 437 (2d Cir. 1939) cert. den. 308 U.S. 560 reh. den. 308 U.S. 636 (1940) 18

Vaughan v. Atkinson, 369 U.S. 527 (1962) 23

Wooten v. Skibs A/S Samuel Bakke, 431 F.2d 821 (4th Cir. 1969) 18

Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996) 24

OPINIONS BELOW

The Third Circuit Court of Appeals' Opinion was marked "Not Precedential" but was published at 114 Fed. Appx. 511. The District Court's Opinion was published at 334 F. Supp. 2d 615. The Court of Appeals Opinion is at App. 11 and the District Court's Opinion is at App. 1.

JURISDICTION

The Third Circuit filed its Decision on December 1, 2004 and entered an Order denying Petitioner's Petition for Rehearing on December 27, 2004. By letter dated March 11, 2005 the Supreme Court Clerk's office advised Petitioner's counsel that Justice Souter had granted Petitioner's Motion to Enlarge the Time for Filing a Petition for Writ of Certiorari to and including April 26, 2005. The Order denying the Petition for Rehearing is at App. 13 and the letter from the Clerk's Office is at App. 15. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Third Circuit Court of Appeals' decision on a Writ of Certiorari.

STATUTORY PROVISION INVOLVED

46 U.S.C. §688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any

such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

On March 21, 2003 Petitioner (hereafter "Jackson") filed a Complaint in Admiralty which sought a recovery for maintenance and cure, attorney's fees, compensatory and punitive damages and prejudgment interest for Respondent (hereafter DRBA)'s failure to pay maintenance and cure. The Complaint did not mention the Jones Act and was non-jury since it was in admiralty.

On August 6, 2003 Jackson filed a Complaint under the Jones Act and general maritime law for compensatory damages arising from DRBA's negligent failure to provide prompt and adequate medical care and to modify Jackson's working conditions, all of which caused a congenital feet condition to become sore and painful, which ultimately required surgery and therefore disabled him. A jury trial was demanded.

By Order dated October 21, 2003, a Magistrate Judge consolidated both cases upon Motion by Jackson, and a jury trial was granted on all issues pursuant to *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16 (1963).

Discovery disclosed the following facts:

Jackson was born on January 9, 1949 and attended primary schools in the Cayman Islands. He never completed the equivalent of high school but went to sea in 1965. He got his GED while working for DRBA in 1993 or 1994.

Jackson first obtained a seaman's document in 1965, and he became an A.B. in 1968. He sat once for a second mate's license but failed the test and never tried again. He began working for DRBA in 1987 as a summer relief, and in 1994 he became a permanent A.B.

Jackson's personnel file was not submitted to the District Court, but it would be offered in evidence if the case were to go to trial. It is mentioned here because it belies one of the District Court's factual observations.

The personnel file shows that Jackson consistently was well rated for his performance over the years. However, in 1999 he filed a racial discrimination lawsuit against DRBA along with two other African-Americans, and a principal claim was that he worked in a "hostile" environment.

Nonetheless, the personnel file shows that during 2000 he was singled out for Commendations on April 16, 2000 and June 12, 2000. Jackson was also awarded a Certificate of Merit on May 14, 2000 along with another seaman which read as follows:

> The above named individuals were nominated for leaving a great and lasting impression on two of our customers. They went the extra mile in providing professional and outstanding customer service to a blind woman and her daughter on a

> recent crossing. So much so that one of the women called to thank Al and Dave and to let us know that the two men truly made their crossing a memorable experience.

His immediate supervisor, a Pilot, made the following comments about him on June 10, 2000 as part of his annual evaluation:

> Albert is involved with a lot of controversy with the D.R.B.A. In spite of that he comes to work and he does his job consistently. He works well and is a team player with Crew 4. He gets along reasonably well with shipmates, and he does his part in the overall effort. He did his part in the chute deployment. He steps up and puts out extra effort with large crowds.

During the summer of 2000 Jackson worked mostly 11-hour days, some 8-hour days and one 7-hour day. He began having problems with his feet in late 2000, so he saw his family doctor, Dr. Prime, who sent him to a foot specialist, who recommended inserts for his shoes – orthotics. Dr. Prime notified Leo Long, Director of Benefits Administration at DRBA of Jackson's ailment and identified the cause as "from standing for too many hours while at work." He recommended that Jackson be supplied with orthotics. Since Dr. Prime had said that Jackson's painful feet could be work-related, Long ordered his subordinate, Bonnie Miller, to get an independent medical exam. Miller, whose job was to handle marine claims, set up an exam by a podiatrist of DRBA's selection, Dr. Michael Centrella.

Miller sent Dr. Centrella a letter dated February 14, 2001, which read in relevant part as follows:

> In order for the Authority to proceed with a claim either under his medical benefits or under the

> Jones Act, I am requesting a report from you which better helps a determination of aging process, previous employment and current employment as factors regarding his current physical state. We will obtain medical records to determine if his is a congenital or acquired, or newly acquired state.

Miller then knew that if Jackson's sore feet were work-related, he was entitled to maintenance and cure.

Dr. Centrella's report of March 1, 2001 was received and reviewed by Long and Miller. It read as follows:

> In regards to Mr. Albert S. Jackson's examination on January 31, 2001, the following was observed. Mr. Jackson has a bilateral congenital flat foot (Equinus) deformity due to tight achilles tendon and gastrocnemius Soleus muscle group. These conditions get worse with age and are a result of prolonged standing and walking. His full time duties included being on his feet in excess of eleven hour days and this has made symptoms worse. He had been casted for orthotics from Dr. Prime but somehow never received them. These orthotics would help him tremendously including stretching exercises at home and minimizing his standing and walking to a reasonable eight hour day. Because of his flat feet any excessive load on the feet will eventually cause the foot to breakdown and over time will start to be painful. This is mainly due to the healing process of the stretched fibers of the plantar fascia and achilles tendon. He also has bone spurs on the back of both heels which is usually seen with a tight achilles tendon. The patient also gets relief by taking Celebrex for pain and inflammation.

Miller understood from Dr. Centrella's letter that Jackson's painful feet were related to his work. She did not recommend to Long that maintenance be paid or that DRBA pay for the orthotics. Long and Miller did nothing to try to ease Jackson's working conditions.

Instead, Long sent Jackson a letter dated April 4, 2001, which read as follows:

> We have received the results of the independent medical examination performed by Dr. Michael Centrella, Jr. during your visit of January 31, 2001. It is Dr. Centrella's finding that you do have bilateral *congenital* flat feet. This means the condition was present at birth and has been part of your entire life experience.
>
> It seems aging along with prolonged standing and walking cause the condition to become an even more significant long term problem based on this examination. Dr. Centrella's opinion confirms orthotic devices are likely to be helpful when used in conjunction with stretching exercises at home and a reduction in time spend standing. As you know those devices are not covered medical services.
>
> Since this is a congenital condition not caused by your work environment, it seems likely the insurer will dispute your claim of an on the job injury – a view you expressed to Bonnie Miller and I when we discussed the need for your orthotics. If you wish to pursue that issue, please contact Bonnie regarding the procedure for making your work basis for a claim related to your feet and the orthotic devices, as we will not follow up on that statement unless you actually file a claim on that basis.

> Since this Podiatrist also mentions spending less time on your feet could be helpful in delaying any onset of more long term foot pain, you may want to consider exploring opportunities for work which does not require as much standing and walking as part of your job responsibilities as now exit (sic). Again, this is a matter of personal initiative for you to consider.
>
> If you have any questions about the content of this letter, please call me directly (X6442). If you elect to file a marine compensation claim, please contact Bonnie (X6338).

The claim form to which Long referred was supposed to be completed by a supervisor and not an employee. Jackson didn't trust Long "as far as he could throw him" because he had had differences with Long on other issues just shortly before and they undermined Long's credibility.

Jackson telephoned Miller, and she insisted that he fill out an Incident Report. Jackson examined an Incident Report while at work. Because Long's letter referred to a birth defect, Jackson was fearful that if he filled out such a form and claimed his condition was work-related, he would be accused of insurance fraud by DRBA. He thought Long was setting him up to be fired, so he never completed the form.

In early 2001 Jackson spoke to his supervisor about having his 11 hour work days reduced. The supervisor refused to do so because that would be showing preference. He also said that Jackson could not work in the yard, where there was an 8-hour day, because Jackson lived in Delaware and the yard was in New Jersey, so Jackson would be spending too much time commuting on the ferries.

DRBA has never paid for Jackson's orthotics and Jackson's hours were never reduced. In August 2002 Jackson returned to Dr. Centrella. Dr. Centrella has performed surgery on both of Jackson's feet, and Jackson has been unable to work since August, 2002.

THE SETTLEMENT OF JACKSON'S DISCRIMINATION LAWSUIT

Jackson filed a racial discrimination lawsuit in U.S.D.C. D.N.J. against DRBA in 1999. In summary, the allegations were "that there was discrimination, violation of both Federal statutes, the New Jersey Law against discrimination; there was a hostile environment that was created; there was retaliation that existed."

DRBA's insurance carrier was Coregis Insurance, and it provided employment practice coverages that included discrimination-type claims. No maritime insurer ever participated in the defense of the discrimination suit, and no one connected with DRBA knew if any maritime insurance company was even notified.

Settlement discussions began in the fall of 2000, and these concerned principally a termination of Jackson's employment. They were not fruitful, and settlement was not discussed at all during 2001.

An all day mediation in early 2002 was unsuccessful as was a lengthy settlement conference with District Judge Simandle in April 2002. Jackson was always unwilling to give up his employment. Jackson was then under enormous pressure daily due to his racial discrimination lawsuit. Jackson filed a written Complaint against Captain Pulli, a

Ferry Captain who was alleged to be a principal in the discrimination practices. This was dated April 9, 2002, just two months before the case settled. It charged Captain Pulli with "Knowingly and willingly violating DRBA's anti Harassment and anti discrimination policies as well as Federal laws" and "Knowingly and willingly denying qualified & senior able seaman Albert Jackson a turn at the wheel and access to the wheelhouse or bridge."

Jackson also sent a letter the same day to DRBA's Director of Human Resources, and it spells out more of his concerns. It reads in part as follows:

> I am greatly embarrassed and deeply humiliated due to foreseen circumstances within the control of Top Ferry Management that has gotten out of hand. While management blame shifts I suffer. This is not a new problem. Mr. Pulli has done this before and it was covered up by Jeff Lewis. I would like some assurance that there will be no cover up of Mr. Pulli's behavioral problems this time. Joe Zecca did a fine job in his investigation but was lost with Mr. Lewis because he protects his operatives.
>
> What I am dealing with is serial racism. It is problem they have at the Ferry and no one seems to want to do anything about it. Captains Wertz, Pulli and the Port Captain are of this caliber. We no longer have to deal with Mr. Wertz, But, what are you going to do about the other two?
>
> * * *
>
> I have called out sick because of my nerves, stomach, feet, legs and stress. Not getting a wheel allows me to not get off my feet so tremendous pressure is put on my feet, legs and back.
>
> * * *

Jackson was unable to work from April 8th to the 23rd due to his painful feet. He was charged with sick leave and annual leave while he was out. He was not paid maintenance during that period because he had never filled out the Incident Report requested a year earlier. Two blank Incident Forms were sent to him by Miller on May 17, 2002 for him to complete and return in order to start the process for a "Jones Act claim." The medical slips provided to DRBA showed clearly that he was unable to work due to his feet.

Jackson's Merchant Marine Physical Examination Report dated April 28, 2002 shows not only his feet condition, for which he was taking Celebrex, but also that he was then suffering from depression/anxiety and was on Effexor for that condition.

A jury was picked on June 11, 2002 and settlement was discussed all of the following day. Nothing was said about any maritime personal injury claims that Jackson had. At no time did DRBA's counsel mention maritime claims.

The settlement figure was negotiated. Early on Jackson demanded $675,000 or $750,000. At the mediation it was $900,000. During the negotiations on June 12th Jackson's counsel "bandied about" a figure much higher than what Jackson ultimately accepted. DRBA paid more than it had originally offered.

One of the elements of the settlement was that Jackson could never again go onto the non-public areas of DRBA's property. This was not normally imposed by DRBA on its retirees. Another was that Jackson resign from DRBA on June 16, 2002. DRBA was quite willing to pay

for these items just to be rid of Jackson, which was its primary goal.

There was no specific amount identified as consideration for the settlement of any maritime claims that Jackson might have.

When preparing the Settlement Agreement, DRBA's counsel did no legal research but simply reviewed his notes. He never determined what earlier claims Jackson had made against DRBA even though he had a copy of Jackson's personnel file in his office. DRBA's counsel thought that New Jersey law, not maritime law, would govern the release. He had no familiarity with maritime law or with seamen's releases.

DRBA's counsel admitted that during the negotiations there was a discussion regarding "orthotics," but he could not recall what it was. Jackson's counsel recalled that he and his co-counsel had a specific understanding with DRBA's counsel that the issues regarding orthotics were not being released.

During the negotiations, Jackson did not know he had a viable claim because he still thought the condition was congenital. Before the settlement his counsel never advised Jackson of his rights under maritime law. Prior to the execution of the release, Jackson never said or did anything that led his lawyer to believe that Jackson knew what his rights were under maritime law. Jackson's lawyer did not conceive of the orthotics issue in terms of a maritime claim at that time. He knew of Jackson's feet problems and that Captain Pulli had denied Jackson a wheel watch, but he thought this was part of the discrimination by Pulli and did not relate the painful feet to the failure of DRBA to provide orthotics.

After the terms were negotiated and a handwritten memorandum prepared, Judge Simandle convened a hearing. DRBA's counsel then summarized the "essential" terms of the Release, and he mentioned to the Court everything except that it was a release of "all" claims.

Jackson understood the word "all" in the handwritten release to mean all the claims that were specifically discussed. DRBA's counsel thought "all" claims meant "all" claims, but there was no definitional section. Jackson's lawyer understood the word "all" to mean "those claims which were specifically discussed. It was not intended to cover what is now referred to as the seaman's claims."

At the conclusion of the hearing, Judge Simandle, after questioning Jackson, made the following finding:

> "I find as well that Albert Jackson understands and accepts voluntarily and knowingly the terms of the Settlement Agreement and relinquishes his right to continue with the jury trial on these or any other claims that could have been brought against DRBA and its employees in this case."

Jackson's explanation for why he accepted the settlement terms on June 12, 2002 was:

> Q. Well, it was voluntarily in that you didn't have to settle, you could have continued on with your lawsuit, correct?
>
> A. No, counselor. They made me an offer I couldn't refuse. I mean they were chasing me up and down the boat putting all kind of stuff on me, driving me crazy, and I can't – and they make me an offer to get out, and I'm going to get out. Sure, I'm going to get out.

The typed Settlement Agreement contains a laundry list of protective statutes pertaining to employment practices, but it does not mention the Jones Act nor does it include the following standard items normally found in all maritime personal injury releases:

1. The name of the ship on which the accident happened

2. All claims "at law or in admiralty"

3. All lien claims

4. Maintenance and cure claims, unique to admiralty

5. All claims "in personam or in rem"

Jackson's counsel explained that he didn't specifically exclude the maritime claims relating to orthotics because he had an understanding with DRBA's counsel that they were not included. Furthermore, "If the release says otherwise, then it was an oversight on my part."

REASONS FOR GRANTING THE PETITION

1. The Court Should Grant the Petition Because The Court of Appeals for The Third Circuit Has Sanctioned a Decision by a District Court That Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Court's Power of Supervision.

F.R. Civ. P. 56(c) permits the entry of Summary Judgment only if no genuine issue as to any material fact exists, and this Court's jurisprudence in this area is well known. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986);

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

This Court has frequently stressed that the jury plays a "preeminent role" in resolving liability questions in Jones Act cases and "[t]o deprive these workers of the benefits of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." See *Schulz v. Penna. R.R. Co.*, 350 U.S. 523, 525 (1956); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957); *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957) and *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 353-354 (1943).

Since 1823 this Court has recognized and applied the shipowner's fiduciary duties and the wardship doctrine to benefit seamen, and the Third Circuit observed as recently as 1990 that this Court, despite the emergence of unions, has "shown no inclination to depart from its long-established solicitude for seamen." *Barnes v. Andover Co.*, 900 F.2d 630, 637 (3d Cir. 1990). The fiduciary duty and wardship doctrine grew out of Judge Story's opinion in *Harden v. Gordon*, 11 Fed. Cas. 480, No. 6047.

The District Court never mentioned any of the foregoing principles but simply decided the case as it saw fit. It ignored material factual disputes; it made credibility judgments against Jackson; it drew inferences against Jackson; and it claimed to be applying what it said was the law "[a]ccording to the Supreme Court."

First of all, the District Court suggested that this lawsuit was the "latest development" in a "long standing dispute" between the parties. This is not the case. Jackson was a permanent, very good employee of DRBA for five

years before he filed a valid racial discrimination case. He did so, with two other African-Americans, because they perceived themselves as victims of ongoing racial discrimination. Only one who has suffered the indignity of being constantly humiliated, debased and harassed simply because of the color of his skin can possibly understand the depth of the feeling this engenders. Obviously, the District Court has never so suffered since it simply considered the lawsuit a "dispute" and not an effort by three persons to be free of constant vilification for a condition they did not create and could not change.

The District Court says that Jackson "alleges" that DRBA negligently failed to furnish him with orthotics as had been recommended by three doctors, one of whom was employed by DRBA. Before the District Court, DRBA conceded the merits of Jackson's claim, so it was not simply an allegation. At the outset DRBA was obligated to furnish prompt and adequate medical care to Jackson, but it failed to do so and it conceded this in its filings with the District Court. DRBA also conceded that it did not reduce Jackson's working hours below 11 hours per day as recommended by the doctors, but the District Court never mentioned this.

Instead, the District Court completely misstated the procedural history and the relief being sought by Jackson. Jackson initially filed his Complaint in Admiralty and sought maintenance, cure, compensatory and punitive damages for the failure to pay maintenance, prejudgment interest and attorney's fees. The later Complaint was under the Jones Act for the negligent failure to provide prompt and adequate medical care for the feet condition.

DRBA's concession on the merits of Jackson's claim means it was facing exposure for two years of maintenance at $48.06 per day, compensatory damages for two years' failure to pay maintenance, all of the medical expenses incurred for the treatment of Jackson's feet, including two surgeries, Jackson's loss of earnings for two years and an indefinite period in the future, attorney's fees for the efforts to obtain maintenance and cure and punitive damages if they are allowable.

Against that background, DRBA offered no evidence other than the wording of the release in order to have it upheld.

The District Court said the racial discrimination suit was started in 2002, whereas it was filed in 1999. The District Court correctly stated that a settlement of the racial discrimination suit was reached on the second day of trial and memorialized in a handwritten agreement that only referred to "all" claims. The District Court did not mention that the lawyers who negotiated the settlement had completely different ideas on the definition of "all."

The District Court said nothing about an Affidavit submitted by Jackson from a prominent maritime personal injury lawyer which said that "all" as used in settlement negotiations among maritime lawyers means all claims that could have been brought in that lawsuit. The District Court correctly said that Judge Simandle held a hearing on the settlement and questioned Jackson, but the District Court failed to mention that Judge Simandle made a specific finding that the claims that were settled were "these or any other claims that could have been brought against DRBA and its employees in this case." The District Court also failed to mention that DRBA's Chief Operating

Officer testified that this finding by Judge Simandle correctly described the settlement terms to which DRBA had agreed. It was also consistent with Jackson's lawyer's understanding. Only DRBA's lawyer had a different view.

As mentioned earlier, the District Court never recognized the wardship doctrine or the fiduciary duty which a shipowner owes to a seaman with whom it is settling a lawsuit. Instead, it purported to apply the two tests it said represented the "special protection" to which seamen are entitled "[a]ccording to the Supreme Court."

The District Court completely misapplied the test that the release be executed by the seaman "freely, without deception or coercion." It never denied that Long and Miller of DRBA had misled him insofar as his feet condition was concerned, because they had. The District Court never mentioned that Long and Miller were under a fiduciary duty to Jackson. The District Court never mentioned Jackson's state of mind during the negotiations even though there was undisputed testimony that he was being harassed daily; that he had been recently treated for anxiety/depression due to his work conditions and that he accepted the settlement because they were putting such pressure on him daily on the ferry. The District Court never mentioned Jackson's belief that his feet condition was congenital and that he had no claim against DRBA.

The District Court considered the foregoing to be irrelevant because it predated the negotiations. Jackson's state of mind during the negotiations is clearly relevant and counsel knows of no case which condones misleading or deceptive conduct by a shipowner that affects the seaman's judgment during the actual negotiations. Such a rule would completely undermine the force of *Garrett*.

A seaman who settles on the basis of the shipowner's doctor's diagnosis which later proves to be incorrect can have the release set aside. See, e.g. *The S.S. Standard*, 103 F.2d 437 (2d Cir. 1939) cert. den. 308 U.S. 560 reh. den. 308 U.S. 636 (1940); *Stuart v. Alcoa, S.S. Co.*, 143 F.2d 178 (2d Cir. 1944) and *Wooten v. Skibs A/S Samuel Bakke*, 431 F.2d 821 (4th Cir. 1969). Obviously the doctor is not involved in the negotiations, but his incorrect diagnosis is fatal ~~to the~~ release. The District Court thus misapplied long established precedent.

The District Court cited *Borne v. A & P Boat Rentals*, 780 F.2d 1254 (5th Cir. 1986). That case dealt with a claim of judicial coercion which the court found lacking. The release sought to be set aside was a release of the very claim involved in the lawsuit, not some unrelated, non-maritime claim.

By focusing solely on the negotiations in the Courtroom on the second day of trial, on an unrelated claim, the District Court completely eviscerated one of the principal protections this Court established in *Garrett*.

The District Court was equally disrespectful of the *Garrett* tests in its analysis of whether Jackson had a "full understanding of his rights." On this issue the District Court made credibility judgments, which are not permissible when deciding summary judgment motions, and it drew inferences against Jackson, which is equally impermissible. It also made fact findings which only a jury should make.

Jackson's eight injury reports to DRBA were required by DRBA's Standard Operating Procedures and all involved injuries. None involved a congenital condition made worse by working conditions. Of the eight, only one resulted in a

claim, and for this Jackson retained counsel and settled with DRBA for $2,500.00.

Jackson's cases against the National Maritime Union dealt in considerable part with political issues. From all of these, Jackson netted $4,000.00 personally, and the large settlement in one was used to fund a campaign for the union presidency. The District Court's description of this litigation is at odds with the sworn testimony to which it cites.

Jackson's lawsuits against former employers for personal injuries also involved actual injuries and not the worsening of a congenital problem. Furthermore, these lawsuits were all filed well before 1987 when Jackson began working for DRBA, so they were ancient history when Jackson settled his racial discrimination suit in 2002.

Finally, the District Court refers to EEOC Complaints and NLRB Complaints, but it does not explain how these enhanced Jackson's understanding of his maritime personal injury rights. In any event, these are matters best left for a jury to resolve rather than a Judge on summary judgment.

The District Court cited the McKoy reservation of a worker's compensation claim and Jackson's "prior behavior" as evidence of a "keen awareness" of legal options.

The foregoing statements are not only jury questions, but they are just untrue. Jackson never filed a maintenance and cure claim with DRBA. In 2001 he sought to have DRBA pay for his orthotics, but this was denied. DRBA's personnel refused to entertain a claim for any benefits unless he filled out an Incident Report. This he

never did because he didn't trust the people involved and thought he was being set up to be fired. In April 2002 he was out for medical reasons involving his feet, but DRBA required him to use his sick and annual leave and never paid him maintenance.

Jackson certainly knew that his feet hurt because he was taking Celebrex for the pain. In 2002 he was still working 11 hour days, and he was denied a wheel watch by Captain Pulli, who was the principal target of his discrimination lawsuit. A wheel watch would have enabled him to sit down for 1 of the 11 hours he was working.

The District Court said that Jackson had legal advice available to him. This is completely belied by the testimony of Jackson's lawyer at deposition. This is set forth in part in the Appendix at pp. 17-24. This shows that his lawyer never recognized the orthotics issue as a maritime claim and that he never advised Jackson of his rights under maritime law prior to the settlement. The District Court ignored all of this since it belied everything it did say. At the very least, Mr. Grassi's testimony should have assured a jury trial.

The District Court cited a small portion of *Borne*, but it neglected to say that *Borne* dealt with a settlement which was negotiated when the seaman was represented by counsel. The *Borne* Court said:

> "We come then finally to consider whether the district court erred in not allowing this seaman, who was acting upon the advice of counsel after a full investigation, to repudiate a settlement whereby he orally agreed to dismiss this action in return for $9,000. We hold that the district court did not err. When a seaman is acting upon

> independent advice and that advice is disinterested and based on a reasonable investigation, there being no question of competence, a settlement agreement will not be set aside" (citations omitted).

Had the District Court applied this language to this case, the Motion would rightfully have been denied. There was no investigation of Jackson's claim. There was no "independent advice" because Jackson's counsel did not realize that Jackson had a Jones Act negligence/ maintenance and cure case by reason of the failure to provide orthotics. Finally, there was a question of competence because Jackson's lawyer represented him only in connection with his discrimination lawsuit.

The District Court's discussion of the settlement funds is also misleading and incorrect in several very important respects. DRBA's Chief Operating Officer testified that Jackson had a history of making "personnel claims", i.e. "working conditions, supervisory treatment, management and board behavior" and DRBA wanted to bring those claims to an end and terminate Jackson's employment to be rid of him. DRBA had no concern about claims for personal injuries Jackson may have suffered. DRBA paid a substantial portion of the settlement to accomplish the settlement and thus get rid of Jackson.

The testimony is clear that no specific sum was allocated for a settlement of any specific claims and nothing was paid to settle any maritime claims. The testimony is clear that DRBA agreed with Judge Simandle's finding at the end of the Hearing and that described the claims that DRBA thought it was settling. This was not all "possible claims" as the District Court wrote.

The language from *Harden v. Gordon*, cited in *Garrett*, requires that a shipowner must prove there was an adequate *quid pro quo*, and there was no such proof in this case nor can there be at trial.

2. This Court Should Grant Certiorari So a Full Factual Record Can Be Prepared on the Issue of Punitive Damages to Enable this Court to Clarify this Area If this Case Returns to this Level.

The District Court misstated the procedural history of the case and based its holding on punitive damages on an incorrect view of Jackson's claims. The District Court cited *Garrett* extensively, but it obviously failed to grasp one of the fundamental teachings of *Garrett*, as follows:

> The right of a seaman to recover damages for negligent injury arises under the Jones Act and the right to maintenance and cure irrespective of negligence arises under the law of admiralty. These rights are independent and cumulative (citations omitted). 317 U.S. at 240 fn.2.

Jackson sought punitive damages for DRBA's recalcitrant refusal to pay maintenance and cure, and this claim sounds in admiralty. Jackson's Complaint for a Jones Act recovery was filed months later and was founded upon DRBA's failure to render prompt and adequate medical care and alter Jackson's working conditions. The Complaint says nothing about punitive damages, yet the District Court's Opinion held that punitive damages are not recoverable when sought in connection with a Jones Act claim.

As support for the foregoing, the District court cited *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). *Miles* held

that certain forms of nonpecuniary damages were not available under the judicially fashioned wrongful death action created in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The reason was that such damages were not recoverable under the Jones Act and the Death on the High Seas Act, the Congressional enactments most closely analogous to the *Moragne* remedy. This Court felt limited in fashioning its own remedy by the policy choices made by Congress and a desire to "restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOSHA, the Jones Act, or general maritime law," 498 U.S. at 33.

The leading appellate case determining that punitive damages cannot be recovered for the willful refusal to pay maintenance and cure following *Miles* was *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). There the Fifth Circuit Court of Appeals fully discussed this Court's holding in *Vaughan v. Atkinson*, 369 U.S. 527 (1962) and concluded that it is not good authority for the notion that willful failure to pay maintenance and cure entitles a seaman to recover tort-like punitive damages. The *Guevara* court went beyond *Miles* and held that punitive damages are not recoverable whether or not a seaman also brings a Jones Act action for compensatory damages for the worsening of his condition caused by the failure to pay maintenance.

The other appellate case denying punitive damages in maintenance cases is *Glyn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995). Although recognizing the uniformity principle stressed in *Miles*, the *Glynn* Court thought that attorney's fees were enough of a deterrent and punitive damages are unnecessary.

Then this Court decided in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). That case determined that state remedies were still available to someone not engaged in maritime employment since no federal statute specifies the appropriate rule and *Moragne*, supra, did not displace the traditional maritime rule that state remedies applied in such circumstances.

After *Yamaha* courts began to reconsider whether *Miles* should be read as broadly as the courts were reading it. Counsel has located no appellate maintenance cases post – *Yamaha*, so the question is open whether *Guevara* and *Glynn* are still viable.

As to non-seamen: "*Miles*' application to cases involving claims of non-seamen is not as clear. Indeed, Courts have characterized this area of the law as a 'labyrinth of factual scenarios and legal theories from various courts yielding different results.'" *Jurgensen v. Albin Marine, Inc.*, 214 F. Supp. 2d 504, 507 (D. Md. 2002) (quoting *Schumacher v. Cooper*, 850 F. Supp. 438, 454 (D.S.C. 1994)). *Jurgensen* contains a very good discussion of the development of the law post *Miles*.

The factual record before this Court would not enable it to decide an issue of such importance. Indeed, it is conceivable, but most unlikely, that a jury might decide that Jackson is not even entitled to the counsel fees allowed by *Vaughan*. Jackson is simply suggesting that the law made by the lower courts in this area is virtually unfathomable, and these courts need further guidance from this Court, especially since the maritime jurisprudence has been the special province of this Court since the Constitution granted this Court exclusive jurisdiction of

admiralty and maritime matters with no concomitant grant of power to Congress.

CONCLUSION

This lawsuit was filed on March 21, 2003, and since that time neither Jackson nor his counsel has ever met, seen, conversed with or had any communication or connection whatsoever with the District Judge who decided the case.

On February 20, 2004 DRBA filed a Motion for Summary Judgment with an Affidavit, Memorandum of Law and 28 Exhibits. Jackson filed an Opposition and Counter-Motion to Strike the Release Defense, with Certification and Memorandum of Law. Jackson also filed an Appendix of more than 400 pages of factual testimony and other exhibits. DRBA filed a Reply to the Motion to Strike, with Certification and Memorandum of Law. Seven days after this mass of material was filed, the District Court signed and filed its Opinion.

This case does not require briefing or argument. It does not yet implicate a matter of compelling national importance. It simply involves one of this Court's wards, a seaman, who has had a right granted to him by Congress, a jury trial, taken away for reasons that are incomprehensible, in an Opinion that blatantly ignores settled procedural and substantive law.

The Court of Appeals' affirmance, in a one and a half page Opinion which characterized the District Court's Opinion as "carefully drawn and comprehensive" shows

that that court read not one page of the 616 page Appendix and just didn't want to be bothered.

Jackson asks this Court to grant the Petition and summarily reverse the Court of Appeals with directions to return the case to the District Court where the release defense should be stricken and the case permitted to proceed to a trial on the merits, with leave to develop a full factual record on the punitive damages issue so that this Court will have a full record to enable it to decide the issue if the case returns to this level.

Respectfully submitted,

E. ALFRED SMITH
CHRISTINE L. SERBANIC
Attorneys for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALBERT JACKSON **Plaintiff,** **v.** **DELAWARE RIVER AND BAY AUTHORITY,** **Defendant.**	**HONORABLE JOSEPH E. IRENAS** **CIVIL ACTION NO. 03-1236 (JEI)** **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO STRIKE THE RELEASE DEFENSE**

APPEARANCES:

E. ALFRED SMITH & ASSOCIATES
By: E. Alfred Smith, Esq.
1333 Race Street, 2nd Floor
Philadelphia, Pennsylvania 19107
Counsel for Plaintiff

DONNA ADELSBERGER & ASSOCIATES, P.C.
By: Mary Elisa Reeves, Esq.
6 Royal Avenue, P. O. Box 530
Glenside, Pennsylvania 19038
Counsel for Defendant

IRENAS, District Judge:

This matter having appeared before the Court upon Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion to Strike the Release Defense, the Court having reviewed the submissions of the parties, and it appearing that:

1. This case is the latest development in what appears to be a long standing dispute between the Plaintiff, Albert

Jackson ("Jackson") and the Defendant, The Delaware River and Bay Authority ("DRBA"). Jackson, once an employee of the DRBA, currently seeks to recover damages from his former employer on account of a congenital foot injury allegedly exacerbated by DRBA working conditions.

2. Albert Jackson is a seaman formerly employed by DRBA as a crew member of various vessels, including the Cape May, Twin Capes and the Delaware. In December 2000, while still working for the DRBA, Jackson became aware of a painful condition in his feet. After seeing several doctors, including one recommended by the DRBA, Jackson was told that he required orthotic shoe implants. Jackson alleges that the DRBA negligently failed to furnish him with orthotics. This failure has resulted in operations to Jackson's feet, additional knee injuries and emotional distress. It has also apparently rendered Jackson completely unable to work.

3. Jackson filed his Complaint pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law.[1] He specifically seeks: (1) damages resulting from the DRBA's failure to pay maintenance and cure in connection with the foot condition; (2) punitive damages based on the DRBA's negligent failure to provide orthotics; and (3) a retroactive wage increase for the final months of his employment, based on union negotiations that concluded after his employment.[2]

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[1] Jackson actually filed two Complaints in the instant action, but Magistrate Judge Donio consolidated them in an Order dated October 24, 2003.

[2] Though the Court finds these claims barred by the release Jackson executed in connection with a prior case against the DRBA, there is no implication that the claims would be valid but for the

(Continued on following page)

4. The legal history between Jackson and the DRBA, however, begins before the Complaint was filed in this action. Jackson was one of three plaintiffs who previously brought a racial discrimination case against the DRBA in 2002. On the second day of trial before Judge Simandle, June 12, 2002, the parties executed a handwritten memorandum which specifically stated that Jackson was releasing "all claims" against the DRBA. (Def's Ex. 12). Shortly thereafter, Judge Simandle held a hearing on the record to make certain that Jackson and his co-plaintiffs understood and accepted the terms of the settlement. Jackson replied affirmatively. (Def's Ex. 11).

6. The settlement was formalized and executed on July 1, 2002. According to its terms, Jackson received a lump sum payment of $125,000.00 and an acceleration of his retirement pension. (Def's Ex. 4). The pension payments are collectively worth $135,165.96. The settlement also extends life, health, dental and vision insurance coverage to Jackson and his wife.

7. In addition to releasing his claims against the DRBA, Jackson agreed to: (1) resign his employment, effective June 16, 2002; (2) never seek employment with the DRBA in the future; and (3) restrict himself to only that DRBA property which was open to the public. The DRBA's counsel explained that because of Jackson's propensity to file complaints and claims during his tenure

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settlement. Jackson's second claim, a request for punitive damages, is particularly troubled as punitive damages may not be awarded in a seaman's personal injury case under the Jones Act. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 (1990); *O'Connell v. Interocean Management Corp.*, 90 F.3d 82 (3d Cir. 1996); 1 *THOMAS J. SCHOENBAUM ADMIRALTY AND MARITIME LAW* § 5 17 (3d ed. 2001).

with the DRBA, the settlement was designed to "buy peace entirely." (Def's Ex. 15 at 31-32, 41-43, 50-51).

8. The DRBA brings its current motion for summary judgment on the theory that Jackson's present claims are barred by the terms of the settlement agreement and Jackson's release of all present and future claims.[3] Jackson cross-moves to strike the release as a defense to his claim. The Court will grant the DRBA's motion for summary judgment and deny Jackson's motion to strike the release as a defense. Original jurisdiction to hear this action at maritime law is based on 28 U. S. C. § 1333.

9. The issue present in this case is the validity of the release of all future claims as specified in the settlement between Jackson and the DRBA of July 1, 2002. According to the Supreme Court, seaman (sic) are entitled to special protection in legal matters, and accordingly, there is a two-part test to determine the enforceability of a seaman's release. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). First, a court must determine whether the release

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[3] The relevant provision of the settlement agreement reads:

> For good and valuable consideration received and/or to be received as set forth below, Jackson hereby releases and discharges the DRBA . . . (Releases) . . . from any and all actions, causes of actions, suits . . . and demands of every nature and description whatsoever, in law or equity . . . including, but not limited to . . . compensatory damages, punitive damages, attorney's fees, costs, and any claims which were or could have been asserted in the Lawsuit and all other claims and causes of action of every nature and description which Jackson . . . ever had, now has or hereafter can, shall or may have for, upon or by reason of any matter, cause action or thing whatsoever whether known or unknown from the beginning of the world to the date of this Release. (Def's Ex. 4 at 1,2).

was executed freely, without deception or coercion. *Id.* at 248. Second, a court must examine whether the seaman entered the settlement with a full understanding of his rights. *Id.* The adequacy of consideration and the nature of the medical and legal advice available to the seaman are key issues in the analysis of this understanding. *Id.*

10. As to the first element of the *Garrett* test, there was no deception or coercion in the negotiation of Jackson's release. The settlement reached between Jackson and the DRBA was the product of significant negotiation between the parties, and Judge Simandle held a special hearing to ensure that the decision was freely and voluntarily made. During that hearing, Jackson's attorney specifically stated that the settlement was only reached "after going back and forth for hours." (Def's Ex. 11). Further, Judge Simandle directly asked Jackson whether he entered the agreement voluntarily. Jackson replied affirmatively. *Id.* It cannot be said that there was any coercion or deception that took place during the negotiation of the settlement.

11. Jackson obviously disagrees with this notion, but his description of deception and coercion is in fact unrelated to the negotiation of the settlement. Jackson argues that Leo Long of the DRBA's Benefits Department and Bonnie Miller of DRBA Risk Management consistently mislead him while he pursued an administrative remedy for his foot injury. Jackson further maintains that Mr. long and Ms. Miller's alleged misbehavior caused him to believe that his foot condition was not a legitimate claim – that because it was congenital, he could not recover against his employer for it. (Pl's Br. 6-9).

12. Nevertheless, this argument only addresses the initial handling of Jackson's foot condition, not the negotiation

of his release of all claims on June 12, 2002. A court must examine "whether there is any appearance of 'taint or fraud, deception, coercion or overreaching . . . in the negotiations eventuating in the settlement." *Borne v. A & P Boat Rentals No. 4, Inc.*, 780 F. 2d 1254, 1257 (5th Cir. 1986) (quoting *Strange v. Gulf & South American Steamship Co., Inc.*, 495 F.2d 1235, 1236 (5th Cir. 1974)). There is nothing in this case to suggest that the *negotiations* on the second day of trial before Judge Simandle were deceptive or coercive in any way, and therefore, this Court finds that the release was executed freely.

13. The second element of the *Garrett* test to evaluate the enforceability of a seaman's release is an examination of whether upon entering the release, the seaman fully understood his rights. Of note in making this determination is the adequacy of consideration and the nature of legal and medical advice given to the seaman. In this case, Jackson is a sophisticated and experienced litigant. This Court finds little doubt that he entered into the settlement agreement with a full understanding of the claims he was relinquishing. Further, Jackson received ample consideration for his release, and he was well appraised of his medical and legal situation while negotiating.

14. Jackson naturally argues here that he was unaware of the full impact of releasing "all" of his claims against the DRBA in the July 1, 2002 settlement. In assessing that notion, some discussion of Jackson's litigious history is warranted.

15. Jackson has filed no less than eight injury reports with the DRBA during his employment, for injuries including a finger puncture, stomach muscle strain, a concussion sustained from a falling lifeboat and a headache

from paint fumes. (Def's Ex. 1 at 27-40). Jackson has initiated at least three lawsuits against the National Maritime Union on claims ranging from RICO violations and racketeering to a contract violation. In two of those cases, Jackson signed releases in exchange for a significant monetary settlement, as he did here. (Def's Ex. 1 at 41-49). Jackson has also sued at least three former employers: Farrell Lines, Texaco, and Gulf Oil. (Def's Ex. 1 at 49-56). The lawsuit against Farrell Lines was for a knee injury, and it settled for $35,000.00. *Id.* Jackson has also filed multiple claims with the Equal Employment Opportunity Commission ("EEOC") and the National Labor Relations Board.

16. As a plaintiff before Judge Simandle on June 12, 2002, therefore, Jackson was no stranger to a courtroom or to settlement negotiations. Having settled at least three cases, likely more, prior to that date, it is hard to believe that he did not understand that a release of "all" claims against the DRBA would preclude further action against his employer. This idea is bolstered by the fact that a Mr. McKoy, a co-plaintiff before Judge Simandle, orally preserved a workers' compensation claim in been clear to Jackson that if he wanted to preserve any claims, he would have to specify them in the settlement agreement.

17. In further arguing that his understanding of his rights at the time of settlement was incomplete, Jackson contests that he was unaware of any potential claim arising from his congenital foot condition. This argument appears to be at least his settlement agreement with the DRBA.[4] From McKoy's example, it should have partially

[4] The specific excerpt from the hearing before Judge Simandle on June 12, 2002, reads as follows:

(Continued on following page)

untrue. Prior to the settlement, Jackson had actively pursued a claim for maintenance and cure with the DRBA. Jackson filed a grievance with the DRBA (Pl's Ex. 14), and subsequently filed an EEOC grievance listing his foot injury (Def's Ex. 1 at 101-05). Further, Jackson had active discussions with his attorney about the foot injury claim in August, 2001, evidenced in an email he wrote on the

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Mr. Grassi: You understand all those terms, and all the terms written on the paper you're comfortable with and you accept it?

Mr. McKoy: Yes.

Mr. Grassi: You understand that by signing it, by settling it, by having this resolved, that you give up all rights and anything that's subject to this today, this is the end of this, this is finality?

Mr. McKoy: That I do only to this claim. That I do, yes.

Mr. Grassi: Okay. Are there other claims that you have against the DRBA other than this claim pending or present that you feel are not extinguished by this?

Mr. McKoy: That's correct. And I understand. There is a pending – we didn't write it in. There a pending . . .

Mr. Kelley: There's unemployment, a workers' compensation claim. It was discussed, Your Honor. I discussed it with my clients. For the record, I would indicate that this settlement does not extinguish that claim . . .

The Court: All right. That was discussed.

Mr. Grassi: Okay.

The Court: And so that claim for workers' compensation is preserved.

Mr. Grassi: All right.

Mr. Kelley: And when the release is drafted, I will put that in the release, your Honor.

(Def's Ex. 11).

subject. (Def's Ex. 26). Though Jackson now maintains that he was unaware of his foot injury claim at the time of settlement, Jackson's prior behavior betrays a keen awareness of legal options.

18. The *Garrett* opinion also counsels that a court should look to the adequacy of consideration and the medical and legal advice available to a seaman in determining whether he fully understood his rights at the time of settlement. *Garrett*, 317 U. S. at 248. The consideration that Jackson received in the settlement was more than adequate. The settlement featured a lump sum payment of $125,000.00 and an acceleration of Jackson's retirement benefits valued at $135,165.96. Jackson seems to argue that because there was no amount specifically allocated to his foot claim in the prior settlement, the overall consideration paid was inadequate.

19. While the foot injury is not mentioned in the settlement itself, Jackson fails to note that the DRBA's insurance carrier paid only $35,000.00 for the discrimination claim in the prior case The $90,000.00 remainder of the lump sum and the entire retirement package was paid by the DRBA to essentially buy a release of all possible claims and sever the relationship with Jackson entirely. The potential foot claim certainly falls under that compensatory umbrella. Further, cases overturned for inadequate compensation generally do not involve amounts in excess of $250,000.00. See *Morris v. Fidelity & Casualty Co. of N.Y.*, 1971 AMC 695 (E.D. La. 1970) (finding $350.00 an inadequate settlement for a broken jaw where plaintiff had a court-appointed attorney); *Borne*, 780 F.2d at 1256-57 (finding only $9,000.00 an adequate settlement for a back injury where negotiations were fairly conducted by attorneys).

20. Jackson was also in possession of ample medical and legal advice. He consulted two doctors about his foot condition, Dr. Michael Prime and Dr. Michael Centrella. (Def's Ex. 21, 22). There is no doubt that Jackson was medically aware of his foot condition when he released all claims against the DRBA. Jackson was also represented by counsel throughout the prior lawsuit and the settlement negotiations by Joseph Grassi and Sidney L. Gold. Mr. Grassi specifically reviewed the terms of Jackson's release with him. (Def's Ex. 1 at 119). Considering this advice and Jackson's prior history as a litigant, there can similarly be little doubt that Jackson was fully aware of his legal position during settlement negotiations.

21. The Court finds no deception or coercion in the settlement negotiations in the prior lawsuit, and also finds that Jackson entered into the settlement with a full understanding of his rights. Consequently, the release of all claims that Jackson signed is completely enforceable, and it bars his current suit against the DRBA.

And for good cause shown.

IT IS on this 27th day of February, 2004, **ORDERED THAT:**

1. Defendant's Motion for Summary Judgment is **GRANTED.**
2. Plaintiff's Motion to Strike the Release Defense is **DENIED** as moot.

/s/ Joseph E. Irenas
JOSEPH E. IRENAS, S. U. S. D. J.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1696

ALBERT JACKSON,

Appellant

v.

DELAWARE RIVER AND BAY AUTHORITY,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civ. No. 03-cv-01236)
District Judge: Honorable Joseph E. Irenas

Submitted Under Third Circuit L.A.R. 34.1(a)
November 16, 2004
Before: ROTH, SMITH and WEIS, *Circuit Judges*.
(Filed: December 1, 2004)

OPINION

WEIS, Circuit Judge.

Plaintiff was a seaman employed by defendant. He served on the defendant's ferries for more than ten years. In June 2002, plaintiff settled a lawsuit that he and others had brought against defendant alleging racial discrimination

and complaints about working conditions. The settlement agreement was reached after a day of trial in the District Court and after extensive negotiations. The District Court approved the settlement.

An important feature of the agreement was Jackson's resignation. Soon after the settlement, plaintiff filed this suit against defendant alleging entitlement to maintenance and cure, as well as damages under the Jones Act.

After discovery, the District Court granted summary judgment for defendant based on the language of a release plaintiff had signed as part of the settlement agreement. The Court concluded that the words "all claims" in the release were to be read literally and thus barred the suit based on maritime law.

We have carefully reviewed all of the contentions raised by plaintiff seeking to find the release inapplicable. The plaintiff's assertions are not persuasive. Essentially, for the reasons set out in the carefully drawn and comprehensive opinion of the District Court, we will affirm.

Accordingly, judgement of the District Court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1696

ALBERT JACKSON,

Appellant

v.

DELAWARE RIVER AND BAY AUTHORITY,

BEFORE: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, VAN ANTWERPEN and WEIS,*
CIRCUIT JUDGES

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Joseph F. Weis
United States Circuit Judge

DATED: December 27, 2004
*As to Panel Rehearing Only

CLC\cc: E. Alfred Smith, Esq.
Mary E. Reeves, Esq.

March 11, 2005

Mr. E. Alfred Smith
1333 Race Street
2nd Floor
Philadelphia, PA 19107

Re: Albert Jackson
v. Delaware River and Bay Authority
Application No. 04A776

Dear Mr. Smith:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Souter, who on March 11, 2005 extended the time to and including April 26, 2005.

This letter has been sent to those designated on the attached notification list.

The "Motion for leave to proceed as a Seaman" is herewith returned as premature.

Sincerely,

William K. Suter, Clerk

by

Gail Johnson
Case Analyst

NOTIFICATION LIST

Mr. E. Alfred Smith
1333 Race Street
2nd Floor
Philadelphia, PA 19107

Clerk
United States Court of Appeals for the Third Circuit
601 Market Street, Room 21400
Philadelphia, PA 19106

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT JACKSON,	:	**CIVIL ACTION**
Plaintiff	:	
vs.	:	
DELAWARE RIVER AND BAY AUTHORITY,	:	
Defendant	:	**NO. 03-cv-1236 (JEI)**

Oral deposition of Joseph Grassi, Esquire on Wednesday, July 30, 2003.

EXCERPTS FROM DEPOSITION TESTIMONY
OF JOSEPH C. GRASSI, ESQUIRE
JACKSON'S DISCRIMINATION COUNSEL

* * *

Q. Well, let me rephrase the question. If you were aware that Mr. Jackson had claims against the DRBA that he did not intend to release as part of the June 2002 settlement, why did you not specifically exclude those claims within the terms of the seven-page release that he ultimately executed?

A. I can't answer that. I mean, I – I believed that – with respect to the claim for the orthotics, I believed that I had an understanding with Mr. Kelley that they were not excluded. And I believed –

MR. SMITH: Wait a minute. They were not included or excluded?

THE WITNESS: That they were not – I'm sorry, that they were not released by the release and by our agreement. That's – that was my belief. That was my understanding with Mr. Kelley. That's what I understood to be the case.

If the release says otherwise, then it was an oversight on my part. But it was always my understanding during the course of those negotiations that despite the fact that the DRBA wanted to extirpate Mr. Jackson's existence within a zone of 300 miles of the DRBA facility or whatever other nonsense that they intended to incorporate here, that he would have the ability to pursue his benefits claim for his feet, that that was the understanding I had with Mr. Kelley.

And that's – I can't tell you otherwise how that fell out, other than I had three of these negotiations or – or documents to go, and there was, and you'll see in the paperwork, a lot of pressure from Mr. Jackson and anybody else to get this complete once it was done, and for myself, too, because it was an unwieldy file with three clients. I – I wanted the case over with at that point very much. So perhaps in my haste, I overlooked language in that release that may be more expansive than it was intended to be. But it was never negotiated that those claims would be extinguished. It's my specific recollection that it was to the contrary, that – that Kelley knew and had agreed that that claim was not intended to be extinguished by this release.

* * *

17. Would you agree with me that certainly you believed that that claim was settled in connection with the June 2002 settlement?

A. Not in connection with it affecting his feet. What I'm telling you is that any grievance documentation that I got with respect to Pulley not letting Al Jackson take the wheel, I conceptualized as either a new retaliation claim or evidence of an ongoing retaliation with Pulley. And that – at some point, I – either through an action or tactically, I made the determination not to move to amend the Complaint, to include that as a separate claim; and it was always conceptually for me an evidential issue, here's how we show the retaliation. And it was never conceptually for me, oh, look, here's a claim for Al Jackson's feet so that – could it have been released in terms of his feet? No. I mean, it wasn't even conceived of in those terms. So I mean, I don't consider it to have been released by that. It wasn't discussed by anyone. It wasn't – you know, it's – I don't know if that answers your question. But no, I didn't conceive – I don't conceive of it as having been released.

* * *

Q. I recall seeing that.

So it was certainly your understanding, was it not, that in settling the litigation with Al Jackson, they wanted to resolve all issues with him once and for all forever?

A. No. No, because – they wanted to be done with Jackson, correct. But I'm telling you that my – that specifically, these orthotics, that issue, I discussed it with Kelley, and it was to survive. That's – I can't tell you any better than that or any more specifically than that.

Q. His claim –

A. Although, my – you know, frankly, I mean, I didn't conceive of these at the time as a seaman's claim, all right. And – and this may all inure here to my detriment, but

that's what happened. And those claims were not intended to be released. These – these particular claims that he had ongoing with – I'm pretty sure it was with Leo Long.

* * *

BY MR. SMITH:

Q. At the time that you represented Mr. Jackson in connection with his discrimination matters, did he have any other lawyers, other than Mr. Gold?

A. Not that I recall. And do you mean active at the time or had he previously had lawyers? Because I know that he previously had been involved in litigation and must have had lawyers.

Q. Concurrently with your representation, did he have anybody else as far as you know?

A. Not that I recall.

Q. Were you the only lawyer who represented him in connection with his discrimination suit against the DRBA?

A. As far as I know. Other than when he and McCoy and Pitt involved Gold. And Gold wasn't involved in anything other than offering a second opinion; and then, at my request, becoming involved in an attempt to settle the case and made a trip, I think, to Kelley's office and spent some time with Kelley and Reid in an attempt to settle the case.

Q. At any time during all of the negotiations leading up to the settlement of Mr. Jackson's discrimination claims against DRBA were any sums of money ever discussed as being paid by DRBA to settle whatever maritime claims Mr. Jackson had?

A. Absolutely not.

Q. Did you understand that any of the settlement proceeds being paid by DRBA were for the settlement of any maritime claims that Mr. Jackson might have?

A. Absolutely not.

Q. Did you advise Mr. Jackson that any money was being paid by DRBA to settle whatever maritime claims he might have?

A. Could you repeat that?

Q. Did you advise Mr. Jackson that any money that was being paid by DRBA was being paid in order to settle whatever maritime claims he might have?

MS. REEVES: Objection to form.
Go ahead.

THE WITNESS: Absolutely not.

BY MR. SMITH:

Q. At any time prior to the execution of the release by Mr. Jackson, did you advise him of his rights under the maritime law?

A. Absolutely not.

Q. At any time prior to the execution of the typewritten settlement agreement and release, did you advise Mr. Jackson of his rights under the maritime law?

A. It was not discussed with him.

Q. At any time prior to the execution of the handwritten release by Mr. Jackson, did he say or do anything which led you to believe that he knew what his rights under the maritime law were?

MS. REEVES: Objection to form.

THE WITNESS: Not that I recall.

BY MR. SMITH:

Q. Is the same thing true with respect to any time prior to the execution of the typed release?

MS. REEVES: Objection. Same objection.

THE WITNESS: Same answer. I don't recall anything that led me to believe he had any particular knowledge about his maritime claims.

* * *

Q. That memorandum referred to a release of, quote, all claims, unquote; did it not?

A. Yep.

Q. What did you understand that to mean?

A. I understood it to meant – to mean – the reason that it was super – in other words, the reason it didn't say specifically the claims in the lawsuit, and use the docket number, was because there was the Amended Complaint that had been dismissed and there was the EEOC Complaint. And Jackson specifically wanted the EEOC Complaint to survive. That was an ongoing topic during the negotiations. He wouldn't release that claim. That wasn't – that wasn't going to be released. He wasn't going to give that up. And they weren't going to walk out of there without having that released. So that "all claims" was intended to encompass – and – and also, I mean, Jackson had this strategy that what we were going to do was try this case and lose it if we had to, because we were going to absolutely bring it all back on appeal, particularly the

First Amendment claim, and then he was going to get a better shot with a better jury and a better lawyer and a better – so that he wasn't going to give up that claim either. He wanted to go to appeal on that claim.

So that this language was intended to encompass those claims which were specifically discussed. It was not intended to cover what is now referred to as the seaman's claims, which I –

Q. What claims?

A. The seaman's claims. It was not intended to – it was intended – that language was not intended to encompass those.

* * *

SUPREME COURT, U.S.
FILED
MAY 24 2005
OFFICE OF THE CLERK

No. 04-1430

IN THE

Supreme Court of the United States

ALBERT JACKSON,

Petitioner,

v.

DELAWARE RIVER AND BAY AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, Delaware River and Bay Authority, operates a ferry on which the Petitioner, Albert Jackson, was employed as a seaman. In June, 2002, Petitioner settled a lawsuit against the Respondent, in which, after extensive negotiation, a release of all claims was signed. The questions presented are:

1. Whether the United States Court of Appeals for the Third Circuit correctly affirmed the Opinion in the United States District Court for the District of New Jersey in concluding that the Petitioner had waived any entitlement to seek maintenance, cure or damages under the Jones Act by signing a valid release of all claims against the Respondent.

2. Whether this Court's Opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) was correctly interpreted by the United States District Court for the District of New Jersey as precluding punitive damages in a seaman's personal injury case under the Jones Act.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Delaware River and Bay Authority, is a bi-state government agency.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
A. Jackson's Work and Litigation History	1
B. The Settlement of the Prior Lawsuit and Release of All Claims	2
C. Jackson's Current Claims	6
Reasons for Denying the Petition	7
A. The Petition is based on misstatements of fact and matters outside the record	8
B. Jackson Signed a Valid Release barring all Future Claims Against the DRBA	9
C. Punitive Damages are not Recoverable in a Seaman's Case Governed by the Jones Act	13
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Adalman v. Baker, Watts and Co., 807 F.2d 359 (4th Cir. 1986) 12

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) ... 9

Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Tp., 996 F. Supp. 409 (D.N.J. 1998) 12

Blige v. M/V GEECGEE GIRL, 180 F. Supp. 2d 1349 (S.D. Ga. 2001) 15

Borne v. A & P Boat Rentals No.4, Inc., 780 F.2d 1254 (5th Cir. 1986) 10

Boyd v. Cinmar of Gloucester, Inc., 919 F. Supp. 208 (E.D. Va. 1996) 15

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), *on remand*, 896 F.2d 864 (5th Cir. 1990), *overruling on other grounds recognized by, Risich v. Bensalem Tp.*, 2005 W.L. 418611 (E.D. Pa. 2005) 8-9

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 10

Cited Authorities

	Page
Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996)	15
Guevera v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995), *cert. denied*, 516 U.S. 1046, *reh'g denied*, 516 U.S. 1154 (1996)	15
Hollinger v. Kirby Tankships, Inc., 910 F. Supp. 571 (S.D. Ala. 1996)	15
La Voie v. Kualoa Ranch and Activity Club, Inc., 797 F. Supp. 827 (D. Haw. 1992)	15
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)	i, 13, 14, 15
O'Connell v. Interocean Management Corp., 90 F.3d 82 (3d Cir. 1996)	13
Simpson v. Lykes Bros., Inc., 22 F. 3d 601 (5th Cir. 1994)	13
TRW, Inc. v. Andrews, 534 U.S. 19 (2001), *on remand*, 289 F.3d 600 (9th Cir. 2001)	8
Watters v. Harrah's Illinois Corp., 993 F. Supp. 667 (N.D. Ill. 1998)	15
Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996), *on remand*, 1998 W.L. 717430 (E.D. Pa. 1998)	14

Cited Authorities

Page

Statute:

46 U.S.C. § 688 13

Rules:

District of New Jersey Rule 7.2(a) 12

U.S. Sup. Ct. R. 10 7

STATEMENT OF THE CASE

This case involves an attempt by Petitioner, Albert Jackson (hereinafter "Jackson"), a former employee of Respondent, Delaware River and Bay Authority (hereinafter "DRBA"), to collect damages on account of a congenital foot condition allegedly exacerbated by DRBA's working conditions.

A. Jackson's Work and Litigation History.

Jackson was employed as a seaman on ferries owned and operated by the DRBA for over ten years until he voluntarily left its employ in June, 2002. Prior to his employment with the DRBA, Jackson worked as a seaman for various other maritime employers since 1965. Although he lacks a formal education, Jackson is a highly intelligent individual, who had been actively involved in various civil lawsuits prior to this pending litigation and had signed releases in prior settlements. (District Ct. Opinion at 6-7).[1]

Prior to instituting this lawsuit, Jackson had brought numerous claims and lawsuits against former maritime employers and the maritime union, including personal injury suits such as this one, and claims that the union violated the Racketeering, Influence and Corruption Act ("RICO") as well as its own contract and constitution. (R. 45-50a).[2] During

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1. The Opinion of Judge Joseph E. Irenas of the District Court for the District of New Jersey is attached to the Petition for a Writ of Certiorari at Appendix 1-10.

2. The record refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

his tenure with the DRBA, Jackson filed multiple injury reports, grievances over his working conditions and claims of racial discrimination. (R. 35-45a, 572-585a). As a result of his litigious nature, Jackson had settled maritime claims with both the DRBA and former employers on at least five prior occasions. Jackson also had a fair understanding of his rights in connection with maintenance and cure long before he started his employment with the DRBA. (R. 58a). The record clearly supports the conclusion that Jackson was an experienced litigant who understood his rights under maritime law when he signed a Release of all claims against the DRBA.

B. The Settlement of the Prior Lawsuit and Release of All Claims.

Jackson, along with two other employees (Donnie McCoy and Dawn Pitts) was involved in a lawsuit against the DRBA alleging racial discrimination and poor working conditions, which was filed in the New Jersey District Court and settled on the second day of trial before Judge Simandle, June 12, 2002, hereinafter referred to as the "Prior Lawsuit." At the time of the settlement, a handwritten memorandum was prepared outlining the basic terms, which was signed by Jackson. (R. 467-470a). This memorandum acknowledged that Jackson was releasing "all claims" against the DRBA. Judge Simandle also held a hearing on the record to make absolutely certain that Jackson and the two co-plaintiffs understood and accepted the terms of the settlement.

As part of the settlement, Jackson received a lump sum payment of $125,000, and an acceleration of his retirement benefits, valued at $135,165.96, for a total settlement package of $260,165.96. Jackson and his spouse also receive all

standard retirement benefits including health, dental, vision and life insurance, at no cost to them. DRBA's liability insurance carrier paid only $35,000 of the settlement, which was deemed to represent the value of the discrimination claim. The $90,000 remainder of the lump sum and the entire retirement package was paid by the DRBA to achieve closure and the end of all claims by Jackson. (District Ct. Opinion at 6, 9). To this end, in the Release, Jackson agreed to: (1) release all claims against the DRBA, (2) bring no further claims or suits against the DRBA, (3) resign his employment, effective June 16, 2002, (4) never seek employment again with the DRBA, and (5) restrict himself to only public property of the DRBA. (R. 491-497a). The record shows overwhelmingly that it was DRBA's desire to buy peace entirely and to not have to deal with Jackson on any claims in the future.

During the June 12, 2002 settlement confirmation hearing, Judge Simandle questioned Jackson and the two co-plaintiffs individually as to their understanding of the terms of the settlement. Donnie McCoy was questioned first and made it clear that he was only agreeing to settle his discrimination claims and was specifically preserving a separate claim for a work-related injury. This exception was incorporated into the Release signed by Mr. McCoy. (District Ct. Opinion at 7-8).[3] Jackson and his attorneys were thus

3. The District Court Opinion, included in the Petition for Writ of Certiorari at App. 7-8 is misstated at Paragraphs 16-17. Paragraph 16 should read as follows:

> As a plaintiff before Judge Simandle on June 12, 2002, therefore, Jackson was no stranger to a courtroom or to settlement negotiations. Having settled at least three

(Cont'd)

well aware that the settlement was to encompass all possible claims, which is why an exception had to be carved out for McCoy's personal injury claim. When questioned by Judge Simandle, Jackson acknowledged that he was present in the courtroom and heard the questions directed to his co-workers. This would have also encompassed the question the Court asked of Dawn Pitts, the second plaintiff involved in the Prior Lawsuit: "and do you understood as well that if you accept this agreement and this case is dismissed, any claims that you've brought against the DRBA or have against the DRBA to this date are extinguished and that you can no longer proceed on them." (R. 485a).

When it was his turn, Jackson replied affirmatively that he had entered the settlement agreement voluntarily. He had no questions about any of the terms of the agreement and

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(Cont'd)

> cases, likely more, prior to that date, it is hard to believe that he did not understand that a release of "all" claims against the DRBA would preclude further action against this employer. This idea is bolstered by the fact that a Mr. McKoy, a co-plaintiff before Judge Simandle, orally preserved a workers' compensation claim in his settlement agreement with the DRBA. From McKoy's example, it should have been clear to Jackson that if he wanted to preserve any claims, he would have to specify them in the settlement agreement.

Paragraph 17 should read, in pertinent part, as follows:

> In further arguing that his understanding of his rights at the time of settlement was incomplete, Jackson contests that he was unaware of any potential claim arising from his congenital foot condition. This argument appears to be at least partially untrue. . . .

confirmed that he had sufficient time to review the matter and consult with his lawyer. (R. 486-488a). Following the hearing, the Release was prepared and circulated to all attorneys.

Jackson signed the Release, aptly titled "Settlement Agreement and General Release of All Claims" on July 1, 2002, and by its terms, all claims were considered as resolved against the DRBA. The plain language of the Release covered

> any claims which were or could have been asserted in the Lawsuit and all other claims and causes of action of every nature and description which Jackson . . . ever had, now has or hereafter can, shall, or may have for, upon or by reason of any matter, cause, action, or thing whatsoever whether known or unknown from the beginning of the world to the date of this Release.

(R. 492a).

The Release further included, without limitation, any and all claims and causes of action arising out of Jackson's employment by and/or association with the DRBA. (R. 491-492a). The broad nature of the Release and the intent to preclude all claims was well-documented:

> Jackson agrees not to permit, authorize, initiate, or continue the Lawsuit or any civil litigation, other proceedings of any kind . . . on his behalf based in whole or part upon any action or failure to act by Releasees which occurred on or before the date of this Settlement Agreement.

(R. 494a).

Jackson acknowledged that he carefully read and fully understood the terms and effects of the Release, and conferred with his attorney before signing it. (R. 99-100a, 268-269a, 496a). The District Court found no record evidence that the negotiations leading to the settlement were deceptive or coercive in any way and therefore determined there to be no genuine question of material fact that the Release was executed freely. (Opinion at 6). Jackson was also found to be "a sophisticated and experienced litigant" and there was "little doubt that he entered into the settlement agreement with a full understanding of the claims he was relinquishing." (*Id.*) Jackson was given every opportunity to reserve, or at least question the claim concerning his feet, if he so desired.

C. Jackson's Current Claims.

During the pendency of the Prior Lawsuit, in 2000, Jackson developed a painful condition of his feet for which his family doctor prescribed orthotic inserts for his shoes. (Petition at 4). Jackson's health insurance coverage did not cover the cost of the orthotics. Jackson therefore had numerous communications with Leo Long and Bonnie Miller, employees of DRBA in the benefits and risk management departments. They informed Jackson of the requirement to complete certain paperwork in order to pursue a maritime claim. Rather than going this route, Jackson filed a grievance against DRBA and an EEOC Complaint, which listed pressure on his feet as a physical injury from being denied a turn at the wheel watch of the ferry which would have afforded him an opportunity to sit down at the helm during his shift. (District Ct. Opinion at 8). Jackson discussed these claims with his attorney, and even complained that Leo Long was discriminating against him by offering other employees the shoe inserts. (R. 612a).

The District Court reviewed the entire record and concluded that Jackson's "prior behavior betrays a keen awareness of legal options" and rejected the notion that Jackson was unaware of his foot injury claim at the time of signing the Release. (Opinion at 9). The record is replete with support for the District Court's conclusion that Jackson was well aware of the claim regarding his feet in advance of the settlement. He had communicated with Leo Long of DRBA's benefits' department, Bonnie Miller of Risk Management, Operations Manager Glen Cox, Human Resources Director Linda Murphy, and his own attorney about the condition of his feet, the exacerbation of that condition by long hours on his feet and the lack of orthotics. Whether this claim is characterized as an issue of marine compensation, insurance or a grievance, the important point was that Jackson was well aware of his foot injury claims at the time he settled the Prior Lawsuit and signed the Release of all claims. There was ample support for the District Court's conclusion that there was no genuine factual dispute that Jackson knew of his claim with respect to his feet when he signed the Release.

REASONS FOR DENYING THE PETITION

The Petition for Certiorari does not present any compelling reasons for this Court's consideration and contains misstatements of fact and law that need to be addressed. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." (U.S. Sup. Ct. R. 10). The decision below does not conflict with a decision of this Court or any Court of Appeals, nor has an important federal question been presented to this Court. Accordingly, none of the factors outlined in Rule 10 would justify further review of the case on a writ of certiorari. This was a fact intensive case well-supported by the record. Jackson even acknowledges that the case does not implicate a matter of compelling national importance. (Petition at 25).

A. The Petition is based on misstatements of fact and matters outside the record.

Jackson contends that the District Court failed to consider DRBA's concession of the merits of the underlying claim for maintenance and cure, and this allegation is patently untrue. (Petition at 15). For purposes of the dispositive motion filed before the District Court, it was conceded only that, with respect to the underlying claim, there were genuine issues of material fact which would have precluded the finding of summary judgment on the merits. Jackson also falsely contends that the only evidence offered by DRBA was the wording of the Release itself. (Petition at 16). In support of its position that Jackson had waived all claims against DRBA, ample evidence was offered to the District Court including, the handwritten memorandum signed by Jackson on the day of the settlement, the testimony taken before Judge Simandle to confirm the settlement, deposition testimony of Jackson, DRBA representatives, and the attorneys involved in the negotiation of the settlement, prior grievances and claims filed by Jackson, and letters and e-mail communications authored by Jackson.

In order to discount one of the District Court's factual observations, Jackson references evaluations contained in his personnel file. (Petition at 3-4). The personnel file was never mentioned or submitted into evidence at the district court or appellate level. It is well-established that the Supreme Court will only consider issues raised and briefed in the lower courts. *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001), *on remand*, 289 F.3d 600 (9th Cir. 2001); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990), *on remand*, 896 F.2d 864 (5th Cir. 1990), *overruling, on other grounds, recognized by, Risich v. Bensalem Tp.*, 2005 W.L. 418611 (E.D. Pa.

2005); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). Because the personnel file was never discussed below, it should not be considered by this Court in making its determination as to whether to grant certiorari.

B. Jackson Signed a Valid Release barring all Future Claims Against the DRBA.

The District Court properly concluded that the Settlement Agreement and Release of All Claims signed by Jackson on July 1, 2002 barred the claims made in this case. This Court's decision in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) is the benchmark for determining the validity of a seaman's release, and established a two-part test to determine its enforceability. First, the Court must determine whether the Release was executed freely, without deception or coercion. Secondly, the Court determines whether the seaman entered into the settlement with a full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman are key issues in the Court's analysis. The District Court analyzed the record using these factors.

The record contains no evidence that Jackson was in any way coerced or deceiving into signing the Release. Jackson was an experienced litigant who understood his rights, and was fully aware of his foot injury at the time he signed the Release. The arguments raised by Jackson only relate to alleged deception and coercion with respect to the administrative handling of the foot injury claim, and not to the negotiation or signing of the Release. (District Ct. Opinion at 5). The District Court reviewed the evidence and found that the Release was executed into freely, relying on

the principles set forth in *Borne v. A & P Boat Rentals No. 4, Inc.*, 780 F.2d 1254, 1257 (5th Cir. 1986) (holding that a court must examine "whether there is any appearance of taint or fraud, deception, coercion or overreaching . . . in the negotiations eventuating in the settlement."). The District Court found "nothing in the case" to suggest that the negotiations which led to the signing of the Release were deceptive or coercive in any way. (Opinion at 6). Whether Jackson felt he was treated unfairly in the initial handling of this claim is of no relevance.

The second element of the *Garrett* test to evaluate the enforceability of a seaman's release is to examine whether the seaman fully understood his rights. The District Court found ample record support for the conclusion that Jackson was a "sophisticated and experienced litigant." (Opinion at 6). The Prior Lawsuit settled after a day of negotiations during which Jackson was ably represented by two attorneys, Joseph Grassi and Stephen Barry, a maritime lawyer in the same firm. (R. 255-256a). The settlement was then put on the record before Judge Simandle and Jackson had the opportunity to raise any questions or concerns. The record shows that Jackson consulted with his attorneys to review the terms of the Release, and he had adequate legal advice available to him if he had any questions before signing the Release. Jackson had selected an attorney of his own choosing and there was no language barrier, a concern often expressed in seamen release cases. The bald conclusion in the Petition (at 7) that Jackson was not in a proper state of mind during the settlement negotiations is not supported by the record.

Jackson also was in possession of ample medical advice and before signing the Release, had consulted with two different physicians for his feet. (R. 440a, 483a; District Ct.

Opinion at 10). Jackson was fully aware that the orthotic shoe inserts had not been provided by the DRBA and had even, during the course of employment, submitted two "unfit for duty slips" on account of his feet. (R. 604-605a; Petition at 10). The District Court found there to be "no doubt that Jackson was medically aware of his foot condition when he released all claims against the DRBA." (Opinion at 10). There is no record evidence of Jackson being given or relying upon an incorrect medical diagnosis, and Jackson's reference to this line of cases is improper. (Petition at 18).

During the settlement negotiations and subsequent hearing, Donnie McCoy, a co-plaintiff in the Prior Lawsuit, specifically reserved the right to pursue his claim for a work related injury. Jackson acknowledged and admitted that he heard this testimony. The District Court found that from McCoy's example, "it should have been clear to Jackson that if he wanted to preserve any claims, he would have to specify them in the settlement agreement." (Opinion at 7). In further analyzing Jackson's understanding of his rights, the District Court rejected the contention that Jackson was unaware of any potential claim arising from his congenital foot condition. The District Court cited to ample evidence in the record including Jackson's prior grievance filed with the DRBA and the EEOC which listed his foot injury, and his email communication to his attorney complaining of not being supplied the orthotics. (Opinion at 8-9).

As against this backdrop of evidence, Jackson argues that, in the maritime world, the release of "all claims" does not really mean "all claims." Not having any case law to support this rather nonsensical premise, Jackson submitted the affidavit of a maritime attorney who offered his opinion on the scope of the Release, and this was properly rejected

by the District Court. The federal courts of the United States are perfectly capable of interpreting maritime law, and the only time it is appropriate to submit an attorney opinion is when the law to be applied is that of a foreign country. *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986). Moreover, it was improper for Jackson to have attempted to oppose summary judgment with a conclusory and self-serving opinion, instead of referring to genuine issues of material fact.[4] Regardless, even if this Court were to accept the premise that "all claims" was to be limited to all claims that could have been brought in the Prior Lawsuit, the District Court would have reached the same conclusion. The foot injury claims were known and could easily have been raised in the Prior Lawsuit.

The District Court reviewed the record facts and it was absolutely clear that adequate consideration was given for the waiver of all claims. The total financial value of the settlement to Jackson was $260,000, and the insurance carrier contributed only $35,000 for the discrimination claim in the Prior Lawsuit.[5] The record showed that it was DRBA's intention "to essentially buy a release of all possible claims and sever the relationship with Jackson entirely . . . [and] the potential foot injury claim certainly falls under that

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4. Jackson's Affidavit was not based on first hand knowledge of the facts alleged and also violated District of New Jersey Rule 7.2(a) which prohibited the inclusion of legal argument in affidavits. *See, e.g, Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Tp.*, 996 F. Supp. 409, 443 (D.N.J. 1998). It was no wonder that the District Court chose to say nothing about this affidavit in its Opinion.

5. The District Court noted that cases overturned for inadequate compensation generally did not involve amounts in excess of $250,000. (Opinion at 9).

compensatory umbrella." (District Ct. Opinion at 9). While no portion of the substantial settlement in the Prior Lawsuit was specifically allocated to "maritime claims", the intention to release all claims, even future and unknown claims, was clearly set forth in the Release and should therefore be upheld. *Simpson v. Lykes Brothers, Inc.*, 22 F.3d 601 (5th Cir. 1994).

C. Punitive Damages are not Recoverable in a Seaman's Case Governed by the Jones Act.

The District Court did not reach the merits of Jackson's claim for punitive damages finding that it was barred by the Release. Nonetheless, the District Court did note that the claim was "particularly troubled as punitive damages may not be awarded in a seaman's personal injury case under the Jones Act", citing the decisions in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) and *O'Connell v. Interocean Management Corp.*, 90 F.3d 82 (3d Cir. 1996). (Opinion at 2-3 n.2)[6]. This area of the law is now well-settled, and Jackson's efforts to inject confusion should be rejected.

The factual circumstances of this case, that is, the alleged failure to provide medical treatment, is a subject governed by the Jones Act, although relief could also be pursued under general maritime law for the failure to pay maintenance and cure. Jackson's Complaints were originally consolidated because both involved the same set of facts. It is immaterial that Jackson divided his claim initially by filing two Complaints, and does not specifically mention punitive damages in the Jones Act Complaint. The Jones Act still provides the framework for this claim and recovery is limited by the Act. If this Court accepts Jackson's reasoning, any

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6. The Jones Act is codified at 46 U.S.C. § 688, *et seq.*

plaintiff could bypass the limitation in *Miles* by simply dividing his cause of action into two separate complaints, a result which clearly was not intended.

The District Court correctly concluded that punitive damages are not recoverable for a shipowner's failure to pay maintenance and cure. To hold otherwise would be contrary to the mandate in *Miles* wherein this Court enacted a standard to ensure uniformity when there was a conflict between general maritime law and statutory law such as the Jones Act, which clearly precludes an award of punitive damages.[7] In *Miles*, this Court held that if a factual situation is governed by a statute like the Jones Act, then the statute controls the recovery available under general maritime law as well since there should be uniformity in the face of applicable legislation. Since the Jones Act prohibited non-pecuniary recovery, the *Miles* court held that a general maritime unseaworthiness action must have a similar prohibition.

The holding of *Miles* has been consistently applied to preclude the award of punitive damages to seamen seeking damages under both the Jones Act and the general maritime law governing maintenance and cure. Post-*Miles*, it has been uniformly recognized that a seaman cannot recover punitive damages under general maritime law for the failure of a shipowner to provide maintenance and cure since the seaman could not recover punitive damages under the statutory law

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7. Jackson's reliance on the decision in *Yamaha Motor Corp., U.S.A. v. Calhoun* is misplaced. 516 U.S. 199 (1996), *on remand*, 1998 W.L. 717430 (E.D. Pa. 1998). The decision in *Yamaha* did not involve a situation where Congress had prescribed a comprehensive tort recovery scheme, as was done by the Jones Act. Jackson cites to no post-*Miles* precedent in which the uniformity requirement was not applied when there was a controlling statute.

(Jones Act) for the same acts. *Guevera v. Maritime Overseas Corp.*, 59 F.3d 1496, 1513 (5th Cir. 1995), *cert. denied*, 516 U.S. 1046, *reh'g denied*, 516 U.S. 1154 (1996); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Blige v. M/V GEECHEE GIRL*, 180 F. Supp. 2d 1349, 1355 (S.D. Ga. 2001); *Watters v. Harrah's Illinois Corp.*, 993 F. Supp. 667, 676-77 (N.D. Ill. 1998); *Boyd v. Cinmar of Gloucester, Inc.*, 919 F. Supp. 208, 211 (E.D. Va. 1996); *Hollinger v. Kirby Tankships, Inc.*, 910 F. Supp. 571, 573 (S.D. Ala. 1996); *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 797 F. Supp. 827, 831-32 (D. Haw. 1992).

This Court's decision in *Miles* serves as a reminder that "Congress retains superior authority in admiralty matters and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our action." *Blige*, 180 F. Supp. 2d at 1353; *Hollinger*, 910 F. Supp. at 573 (both citing *Miles*, 498 U.S. at 27).

This Court has mandated a uniformity of recovery for admiralty claims that fall within the scope of a statutory remedy. In this case, Jackson's cause of action is governed by the Jones Act, which does not allow for an award of punitive damages. Accordingly, punitive damages are therefore also not available as a recovery as a matter of law under Jackson's general maritime claim involving the alleged failure to pay maintenance and cure.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

No. 04-1430

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

1. The Brief in Opposition Tacitly Admits Petitioner's Contentions 1
2. The Punitive Damages Discussion Makes No Sense 5
3. Conclusion 5

TABLE OF AUTHORITIES

CASES

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 2, 4

Harden v. Gordon, 11 Fed. Cas. 480 No. 6047 (1823) 4

1. THE BRIEF IN OPPOSITION TACITLY ADMITS PETITIONER'S CONTENTIONS

Supreme Court Rule 15.1 encourages parties to point out inaccuracies or misstatements of fact. The Brief in Opposition suggests that there are such misstatements in the Petition, but it doesn't discuss any.

Page 8 of the Brief in Opposition states that Jackson contends that the District Court "failed to consider DRBA's concession of the merits of the underlying claim for maintenance and cure, and this allegation is patently untrue." The Brief then continues, "For purposes of the dispositive motion filed before the District Court, it was conceded only that, with respect to the underlying claim, there were genuine issues of material fact which would have precluded the finding of summary judgment on the merits."

Page 2 of DRBA's Brief in Support of the Motion for Summary Judgment filed in the district court reads in relevant part as follows:

> "For the purposes of this motion for summary judgment, Defendant does not dispute the underlying merits of Plaintiff's claims, but rather maintains that Plaintiff's claims are precluded by the terms of a Release and Settlement Agreement executed by the Plaintiff on July 1, 2002."

Nowhere in the 28 page Brief in Support of the Motion for Summary Judgment is there any reference whatsoever to any genuine issues of material fact pertaining to the underlying claim. In fact, there was no discussion of the underlying claim at all. There could not have been any factual disputes because DRBA admitted that it had never provided orthotics or reduced Jackson's working hours below 11 per day despite Jackson's requests that they do

so. It was also undisputed that DRBA's personnel misled Jackson for 2 years concerning the nature of his malady. How could DRBA possibly dispute the content of Long's letter of April 4, 2001, which is on pp. 6, 7 of the Petition?

The Brief in Opposition says that DRBA submitted "ample" evidence to support the handwritten memorandum and the typed release. Essentially, this "evidence" dealt with Jackson's litigation history and the proceedings before Judge Simandle. This "ample" evidence was virtually all cited in the district court's opinion. That opinion contained only one reference to Jackson's brief and no reference to the hundreds of pages of factual material submitted by Jackson, all of which was under oath. The single reference to Jackson's brief said that the two years of deception practiced by DRBA was irrelevant, even though that deception obviously had an impact on Jackson's state of mind when the negotiations took place.

Jackson earnestly submits that the "ample" evidence is not enough to satisfy the burden imposed by *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). Furthermore, the district court opinion and DRBA's Brief in Support of the Motion for Summary Judgment, which the opinion mirrors, are more notable for what they failed to mention than what they say. The same is true of the Brief in Opposition.

For example, none mentions how the contract and RICO claims and union issues in Jackson's litigation history enhanced his understanding of his maritime personal injury rights. None acknowledges that the earlier lawsuits and incident reports to DRBA all involved traumatic injuries and none involved a congenital condition made worse by excessive work hours. All refer to Jackson's

knowledge of his achy feet, but this is undisputed. Of course Jackson knew his feet hurt since he had been taking Celebrex for pain for two years, and his feet probably hurt during the days he attended the aborted trial. They certainly hurt when he was denied a wheel watch by a racially biased captain who required him to stand for 11 hours. None explains how Jackson could or should have recognized that he had Jones Act/maintenance and cure claims when his own lawyer testified repeatedly that he did not recognize them as marine personal injury claims.

Neither the Brief in Opposition nor the opinion mentions that DRBA's counsel, at the hearing before Judge Simandle, summarized the "essential" terms of the settlement but said nothing about a settlement of "all" claims even though that ambiguous, undefined word appeared in his handwritten release. Both discuss the questioning of Jackson by Judge Simandle, but neither mentions Judge Simandle's very precise description of what claims had just been settled. Neither mentions that DRBA's Chief Operating Officer testified that Judge Simandle's description was precisely what he thought had just been settled by DRBA.

Both discuss the consideration for the settlement, but neither acknowledges that no money whatsoever was paid to settle maritime personal injury claims. Neither acknowledges that maritime claims were not discussed. The district court's opinion says that a separate sum was paid to settle "all" claims, but it cites no testimony to support this. The Brief in Opposition does not cite any such testimony because there isn't any. DRBA's Chief Operating Officer said that DRBA paid from its own funds to sever Jackson's employment, which was its primary goal. Neither the opinion nor the Brief in Opposition acknowledges

the requirement set out in *Harden v. Gordon*, 11 Fed. Cas. 480, 485, No. 6047 (1823) and recognized in *Garrett*, that there be a *quid pro quo* for the claims being given up by the seaman. In this case there was none.

Neither acknowledges that the typed Settlement and Release Agreement fails to identify anything which even hints at a settlement of maritime claims. The Brief attempts to denigrate the Affidavit submitted by an experienced, well-known maritime defense personal injury practitioner by suggesting it was not based on "first hand knowledge." How can a maritime personal injury practitioner, during 39 years of practice, fail to acquire "first hand knowledge" of the routine content of releases when he has prepared "countless" as he put it.

Both the Brief in Opposition and the opinion rely on the language in the typed Release, which is considerably broader than the finding made by Judge Simandle. Neither, however, acknowledges the understanding between counsel concerning the exclusion of the orthotics issues. DRBA's counsel admitted that there was a discussion, but he couldn't recall the content. Jackson's counsel testified very clearly that he had an agreement with DRBA's counsel that the orthotics issues would survive the settlement. This testimony is in the Appendix.

The wording of the release was recognized as the sole basis for the district court's opinion by the Third Circuit's opinion. That court did not even mention *Garrett* and said nothing about the burden imposed by *Garrett*.

Finally, neither the Brief in Opposition nor the district court opinion discussed the wardship doctrine or the fiduciary duties imposed upon the shipowner. Neither acknowledged that the district court could grant Summary

Judgment only if there were no factual disputes and that the district court could make no credibility judgments and had to draw all influences in Jackson's favor. These basic principles have been categorically ignored.

2. THE PUNITIVE DAMAGES DISCUSSION MAKES NO SENSE

DRBA's discussion of the punitive damages issue reflects either incompetence or a deliberate attempt to mislead this Court, which wouldn't make sense because this Court makes the law.

Jackson is seeking punitive damages for DRBA's callous and recalcitrant refusal to pay maintenance and cure concurrently with the need, and this is unrelated to a Jones Act recovery. DRBA's effort to relate this to the Jones Act is not far from the way it misled Jackson into believing he had no maritime rights because his feet condition was congenital.

3. CONCLUSION

This Petition was filed because this Court is Jackson's last hope for obtaining justice. For almost 200 years this Court has described seamen as the "wards" of the federal courts, but so far in this case that has not meant much. Jackson has had a right granted to him by Congress, a jury trial, taken away by a hastily written, inaccurate, biased opinion which displays an arrogant disregard of Jackson's rights and this Court's jurisprudence in several areas as well.

Jackson earnestly requests this Court to grant the Petition; reverse the Court of Appeals and direct that this

case be remanded for a trial on the merits, with the release stricken. Jackson also requests leave to develop a trial record on the punitive damages issue.

Respectfully submitted,

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